No. 90-839

In the Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM "SKY" KING, PETITIONER

v.

ST. VINCENT'S HOSPITAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether an employee's right under 38 U.S.C. 2024(d) to leave of absence from employment to serve in the Armed Forces of the United States is conditioned on the "reasonableness" of the employee's request for leave.

PARTIES TO THE PROCEEDING

The parties to this proceeding are William "Sky" King and St. Vincent's Hospital.[1]

[1] Petitioner is represented by the United States pursuant to 38 U.S.C. 2022, which authorizes the United States to represent individuals in actions involving reemployment rights. See also Pet. 7 n.4.

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In the Supreme Court of the United States

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WILLIAM "SKY" KING, PETITIONER

v.

ST. VINCENT'S HOSPITAL

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 901 F.2d 1068. The opinion of the district court (Pet. App. 13a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1990. A petition for rehearing was denied on August 21, 1990. Pet. App. 24a. On November 9, 1990, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including December 17, 1990. The petition was filed on December 5, 1990, and granted by this Court on February 19, 1991.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The principal statutory provision involved is 38 U.S.C. 2024(d), App., *infra*, 4a-5a. Also reprinted in the Appendix are 32 U.S.C. 502(f) (App., *infra*, 1a) and 38 U.S.C. 2024 in its entirely (App., *infra*, 1a-6a).

STATEMENT

1. The question in this case is whether petitioner, a member of the National Guard, is entitled to a leave of absence from his civilian job to serve for three years in the Active Guard/Reserve Program. Analysis of this question requires consideration of the role of the National Guard and the Reserve forces, and of the evolution of the statutory provisions designed to protect the reemployment rights of members of the Reserves.

The petitioner in this case is a member of the Army National Guard of the United States—one of the seven Reserve components of the Armed Forces of the United States.[2] See 10 U.S.C. 261. National

[2] The National Guard of the United States is comprised of the Army National Guard and the Air National Guard, see 10 U.S.C. 101(9), which are two of the country's seven Reserve force components. See 10 U.S.C. 261. The remaining five components are the Naval, Marine, Coast Guard, Army and Air Force Reserve (which are referred to herein as the Federal Reserve components). All reserve members are assigned to one of three distinct categories created under 10 U.S.C. 267(a): (1) Ready Reserve (a battle-ready component), (2) Standby Reserve, and (3) Retired Reserve. All National Guard members are part of the Ready Reserve. See England, *The Active Guard/Reserve Program: A New*

Guard members, in their federal capacity, are part of the Reserve Corps (known as the "Ready Reserve") of the Army. In accordance with a dual enlistment system dating from 1933, see Act of June 15, 1933, ch. 87, § 582, 48 Stat. 155, under which every member of the Army and Air National Guard of the United States is "a Federal reservist as well as a State militiaman," H.R. Rep. No. 1066, 82d Cong., 1st Sess. 9 (1951), petitioner serves at the same time as a member of the Army National Guard of the United States and of his state National Guard (the Alabama National Guard). See *Perpich* v. *Department of Defense*, 110 S. Ct. 2418, 2426 n.19 (1990).

Members of the National Guard and of the Federal Reserve components (see note 2, *supra*) are available to be called to active duty during a war or in a National Emergency. See 10 U.S.C. 672(a), 673(a). The President also has the power, in the absence of such an emergency, to call up members of the Reserves either for "active duty" or "active duty for training" of varying duration. See Armed Forces Reserve Act of 1952, ch. 608, 66 Stat. 481; *Perpich* v. *Department of Defense*, 110 S. Ct. at 2420-2421 n.1.[3] Members of the National Guard may

Military Personnel Status, 106 Mil. L. Rev. 1, 3-4 (1984) (reviewing organization and history of Reserve components) [hereinafter *The AGR Program*].

[3] See also 10 U.S.C. 672(b) (involuntary call-up of 15 days), 672(d) (voluntary call-up of indefinite duration), 673a (call to active duty for up to 24 consecutive months of Ready Reservist "who has not fulfilled his statutory reserve obligation"), 673(a) (call to active duty for 24 months in an emergency or "when otherwise authorized by law"), 673b (call to active duty for up to 180 days "when the President determines that it is necessary to augment the active

be ordered to serve training or other duty under Title 10 as members of the Ready Reserve of the United States. They may also serve tours of duty under the authority of Title 32 (Sections 501 through 507), which governs training and other duty in the Army and Air National Guard of the United States.[4]

2. Reservists are citizen soldiers. As such, they ordinarily hold civilian jobs from which they must be absent if called to train or serve on active duty. Like other members of the Armed Forces of the United States, Reservists enjoy reemployment rights guaranteed by statute.

a. Statutory reemployment rights for members of the Armed Forces date from the Nation's first peacetime draft law, enacted in 1940. Section 8 of the Selective Training and Service Act of 1940, ch. 720, 54 Stat. 890 (the precedessor of the provision now codified at 38 U.S.C. 2021(a)) provided that a veteran returning from active duty was entitled to be reinstated in his previous civilian position.

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forces for any operational mission"). President Bush recently called more than 200,000 reservists into active duty in the Persian Gulf, as part of Operations Desert Shield and Desert Storm, under the authority conferred by Section 673b. See 1990 Department of Defense, *Total Force Policy, Report to Congress,* at 18-19 [hereinafter *1990 DOD Report to Congress*].

[4] Members of the National Guard who are ordered into active duty (including active duty for training) under Title 10—which governs service in the federal capacity—"lose their status as members of the State militia during their period of active duty." *Perpich* v. *Department of Defense,* 110 S. Ct. at 2426. Members of the National Guard who serve on orders issued under Title 32 retain their state status. See note 25, *infra.*

In 1952, "in order to strengthen the Nation's Reserve Forces," see *Monroe* v. *Standard Oil Co.,* 452 U.S. 549, 555 (1981), Congress for the first time granted job reinstatement rights to members of the Armed Forces, including Reservists, upon return from "training duty." See Universal Military Training and Service Act of 1951, Pub. L. No. 51, § 1 (s), 65 Stat. 86-87.[5] In 1955, Congress enacted another provision (now codified, as amended, at 38 U.S.C. 2024(c)) that protects reemployment rights for a period of full-time, intensive, initial active duty training (IADT) that is required of some Reservists. The 1955 enactment granted Reservists returning from such tours (which were to run from three to six months) the same reemployment rights as inductees. See Reserve Forces Act of 1955, Pub. L. No. 305, § 262 (f), 69 Stat. 602.[6]

b. In 1960, Congress amended the law regarding leaves of absence for "active duty for training," re-

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[5] As codified at 50 U.S.C. App. 459(g)(3) (1958), the new provision provided that "any employee"

> shall be granted a leave of absence by his employer for the purpose of being inducted into, entering, determining his physical fitness to enter, or performing training duty in, the Armed Forces of the United States. Upon his release from training duty or upon his rejection, such employee shall, if he makes application for reinstatement within thirty days following his release, be reinstated in his position without reduction in his seniority, status, or pay except as such reduction may be made for all employees similarly situated.

[6] See also, § 262(a)-(c), 69 Stat. 600 (governing enlistments in the Ready Reserve of the United States Armed Forces, and requiring performance of "an initial period of active duty for training of not less than three months or more than six months").

taining a separate section for IADT, and expressly extending rights under that section to members of the National Guard. Congress also added the provision at issue in this case, now codified at 38 U.S.C. 2024 (d), which entitles Reservists and National Guard members to a "leave of absence * * * for the period required to perform active duty for training or inactive duty training." See Act of July 12, 1960, Pub. L. No. 86-632, 74 Stat. 467; see also S. Rep. No. 1672, 86th Cong., 2d Sess. 1 (1960); H.R. Rep. No. 1263, 86th Cong., 2d Sess. 6-7 (1960) (setting forth amendments to reemployment rights provisions then codified at 50 U.S.C. App. 459 *et seq.*).

c. The most recent revision and codification of the reemployment rights provisions applicable to Reservists is chapter 43 of the Vietnam Era Veterans Readjustment Assistance Act of 1974, 38 U.S.C. 2021 *et seq.*, which is known as the Veterans' Reemployment Rights Act (VRRA or the Act), 38 U.S.C. 2021-2026. Section 2024(a) of the VRRA gives protection for up to four and, in some cases, five years to the reemployment rights of those who enlist in the Armed Forces proper. Section 2024(b)(1) and (2) protect the reemployment rights of Reservists ordered to active duty for a period of up to four years, or longer under certain circumstances.[7]

Reservists and enlistees returning from such active duty are entitled to reemployment in their previous

[7] Section 2024(b)(1) and (2) do not apply, however, to Reservists ordered to "active duty of not more than 90 days under [10 U.S.C.] Section 673b." Section 2024(g) provides that such persons

> shall be entitled to all reemployment rights and benefits provided under [Section 2024(c) of 38 U.S.C.] for persons ordered to an initial period of active duty for training of not less than twelve consecutive weeks.

jobs or in "position[s] of like seniority, status, and pay," provided that they apply for reemployment within 90 days of discharge from duty. 38 U.S.C. 2021(a). Veterans returning from active duty may not be discharged without cause for one year after reemployment. 38 U.S.C. 2021(b)(1).

Under 38 U.S.C. 2024(c), discussed above, Reservists performing IADT for a continuous period of not less than 12 weeks are entitled to reemployment provided that they apply within 31 days of discharge. An employer may not discharge a Reservist returning from IADT without cause for six months following reemployment.

The provision at issue in this case, 38 U.S.C. 2024 (d), protects Reservists performing "active duty for training or inactive duty training," other than IADT. Section 2024(d) requires employers, upon request, to grant Reservists and National Guard members a "leave of absence * * * for the period required to perform" such duty. Unlike Sections 2024(a), 2024 (b)(1), and 2024(b)(2), which cover "active duty," Section 2024(d) contains no limitation on the length of service. Reservists are entitled to reinstatement in the same position they previously occupied if they report back to work "at the beginning of the next regularly scheduled working period." *Ibid.*[8]

[8] All Reservists also receive protection against discharge, demotion, withdrawal of benefits, or other forms of discrimination upon return from, or on account of, service for a period of training or duty. Under 38 U.S.C. 2021(b)(3), a person cannot be denied "retention, * * * promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces." See *Monroe* v. *Standard Oil, Inc.*, 452 U.S. 549, 557-559 (1981). Section 2021(b)(3) was amended in 1986 to prohibit discrimination in hiring of reservists as well. See Pub. L. No. 99-576, § 331, 100 Stat. 3279.

3. Petitioner William "Sky" King is a 35-year veteran of the Alabama National Guard. In June 1987, he applied to serve as Command Sergeant Major, the highest post for an enlisted member of the state National Guard. The Command Sergeant Major, who assists and advises the Adjutant General,[9] serves in the Active Guard/Reserve (AGR) Program, see Pet. App. 3a, 27a, which Congress created in 1980. See Department of Defense Authorization Act of 1980, Pub. L. No. 96-107, Tit. IV, § 401(b), 93 Stat. 807. See also *The AGR Program*, 106 Mil. L. Rev. at 16-28 (describing the origins and nature of the AGR program). The AGR program authorizes members of the Reserve components, including the National Guard of the United States, to serve full-time tours of duty for the purpose of "organizing, administering, recruiting, instructing, or training the reserve components." *Id.* at 16. Army regulations require AGR personnel to serve three-year tours of duty. Army Reg. 135-18, Ch. 2, § II, at 2-9 (1985).[10] Under 38 U.S.C. 2024(f), members of the National Guard serving in the AGR Program in petitioner's capacity are entitled to reemployment rights under 38 U.S.C. 2024(d). See note 11 and pages 33-35, *infra*.

On July 18, the Alabama National Guard informed King that he had been selected for the position of Command Sergeant Major, and King accepted im-

[9] The Adjutant General is the commanding officer of the Alabama National Guard. See 32 U.S.C. 314(a).

[10] The civilian "military technicians" that the AGR personnel were supposed to replace served three-year tours of duty at the time the AGR Program was created. See *Lemmon* v. *Santa Cruz County*, 686 F. Supp. 797, 798 (N.D. Cal. 1988).

mediately. Pet. App. 3a-4a. At some point between mid-July and early August, King notified his supervisor at St. Vincent's Hospital, where King was employed as manager of the security department, that he had accepted a three-year position with the Alabama National Guard. *Id.* at 4a. Although the National Guard told petitioner that he would be informed on July 10 of the date he was to report for duty, it was not until August 7 that he was told to report on August 17. As instructed, petitioner began his three-year tour of duty on that day. *Id.* at 4a-5a.

On September 8, 1987, respondent notified petitioner by letter that his military leave request was denied. The letter stated that, in the employer's view, petitioner's request for a three-year period of leave was unreasonable and that petitioner therefore did not qualify for leave under the VRRA. Pet. App. 5a.

4. The hospital then filed a declaratory judgment action in the United States District Court for the Northern District of Alabama to determine whether petitioner was entitled under the VRRA to a leave of absence for his three-year tour of duty in the AGR Program. The district court concluded that petitioner's tour of duty fell within the scope of Section 2024 (d) of the VRRA. See Pet. App. 18a & n.8.[11]

[11] Petitioner was called to full-time duty in the National Guard under 32 U.S.C. 502(f), see App., *infra*, 1a. In deciding that petitioner enjoyed job protection under 38 U.S.C. 2024(d), the court relied on 38 U.S.C. 2024(f), which provides:

> For the purposes of subsections (c) and (d) of this section, full-time training or other full-time duty performed by a member of the National Guard under sec-

Applying the "reasonableness" test set forth in the Eleventh Circuit's decision in *Gulf States Paper Corp.* v. *Ingram*, 811 F.2d 1464, 1469 (1987),[12] the district court determined that, apart from the length of the leave, petitioner's conduct in requesting leave was not blameworthy. See Pet. App. 18a-21a. The court held, however, that a request for a three-year leave was *per se* unreasonable and that petitioner was therefore not entitled to reemployment rights under Section 2024(d). Pet. App. 20a-22a.

5. The court of appeals for the Eleventh Circuit affirmed, with Judge Roney concurring in part and in the result. The court relied heavily on its previous

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tion 316, 502, 503, 504, or 505 of title 32 is considered active duty for training.

As the court explained, 38 U.S.C. 2024(f) makes clear that full-time duty performed by a National Guard member under Section 502 is considered "active duty for training" under Section 2024(d). Pet. App. 18a n.8.

[12] In *Gulf States*, the Eleventh Circuit identified three factors to be taken into account in evaluating whether a military leave request is reasonable under 38 U.S.C. 2024(d): "the length of the leave, [the employee's] actions, and the burden upon [the employer] in filling [the] position during [the] absence." 811 F.2d at 1469. The *Gulf States* court stated that the employee enjoys a presumption of reasonableness, that "burden on the employer alone is not enough" to defeat the presumption, and that "the weightiest factor in overcoming that presumption is the conduct of the employee." *Ibid.* Only "conduct akin to bad faith on the employee's part" will lead to a finding of unreasonableness. *Ibid.* The court determined, however, that "bad faith conduct might also be shown through requests for leaves of exceptional duration." 811 F.2d at 1470 n.4. The court then held that the one-year leave request at issue in that case was "not *per se* unreasonable," but added that "a greater length of time might reach that level." 811 F.2d at 1469.

analysis in *Gulf States*. There, although acknowledging that "the statute does not address the 'reasonableness' of a reservist's leave request," the court engrafted a "reasonableness" requirement onto Section 2024(d). Pet. App. 7a. In the present case, the court of appeals reiterated the *Gulf States* standard, see note 12, *supra*, that the reasonableness of a request was dependent, in large part, on the Reservist's conduct, and that a request for leave "of exceptional duration" might amount to bad faith conduct justifying denial of leave. Pet. App. 8a.

The court described the legislative history of Section 2024(d) as "self-contradictory," Pet. App. 11a, but took note of the statement in *Monroe* v. *Standard Oil Co.*, 452 U.S. 549, 555 (1981), that Section 2024(d) was enacted "to deal with problems faced by employees who had military training obligations lasting less than three months." Observing that "[n]o case had been called to our attention in which a leave of absence of as long as three years has been held protected under Section 2024(d)" (Pet. App. 11a), the court invoked *Church of Holy Trinity* v. *United States*, 143 U.S. 457 (1892), for the proposition that a "literal construction" of a statute must be rejected to "prevent an absurd, unjust, or unintended result." Pet. App. 9a-10a. The court then found it necessary "to determine a definite limit beyond which any leave would be unreasonable," and decided that a three-year leave was *per se* unreasonable. *Id.* at 11a. Without elaboration, the court added that, "even if we should find that the trial court erred in finding a three year leave *per se* unreasonable, we would nevertheless hold that on the facts of this case, considering the factors outlined in *Gulf States*, the judgment of the trial court should be affirmed." *Ibid.*

In a separate opinion, Judge Roney agreed with the court's holding that petitioner's three-year leave request "was unreasonable on the facts of this case." However, Judge Roney disagreed with the court's adoption of a *per se* rule because "it might work an injustice in some future case." Pet. App. 12a.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. a. The question in this case is whether Section 2024(d) of the VRRA entitles petitioner to a leave of absence from his job for a three-year period of full-time service in the AGR Program. In answering this question in the negative, the court of appeals seriously misconstrued the language of the statute, diluted its force, and undermined its purpose.

The court of appeals read Section 2024(d) to grant a Reservist who is called to "active duty for training" the right to return to his job *only* if a court (balancing three factors) finds the leave request "reasonable," and then ruled that petitioner's request for leave was *per se* unreasonable. In so deciding, the court substantially curtailed the protections afforded by the VRRA by creating an indeterminate and vague standard that generates uncertainty among employers and potential recruits and frustrates Congress's decision to provide economic security to those who serve in the Reserves. The judicially created "reasonableness" test transforms a concrete entitlement—upon which a Reservist can rely in deciding whether to join the Reserves or commit to special training—into a conditional and ambiguous right upon which few would risk their civilian livelihood. In addition, the strict durational limit imposed by the court of appeals creates a powerful disincentive to service in training and other positions, such as the AGR, that require a significant commitment of time.

The rigid *per se* rule established by the court of appeals hobbles the Nation's ability to recruit Reservists in pivotal support positions, and properly to train personnel. As a result, the readiness and integrity of the Reserve components, and of the Armed Forces as a whole, is compromised.

b. The court of appeals' construction of Section 2024(d) is incorrect. The requirement of "reasonableness" finds no support in the text of Section 2024(d). Nor is there any basis for judicial qualification of those terms, since application of the statute as written does not produce "consequence[s] * * * at variance with the policy of the enactment as a whole." *United States* v. *Rutherford*, 442 U.S. 544, 552 (1979). To the contrary, faithful adherence to the broad terms of the statute is necessary to carry out Congress's goals in enacting the VRRA: to guarantee Reservists the benefit of secure employment and to aid recruitment by removing an important disincentive to service.

The qualifications judicially superimposed on Section 2024(d) also run contrary to the principle—stated by this Court—that veterans' reemployment rights must be liberally construed; these qualifications are also at odds with this Court's admonition to avoid interfering with the exercise of legislative or executive judgments concerning military affairs. Finally, the holding ignores Congress's explicit determination that service in the AGR Program should come within the scope of Section 2024(d) and receive full protection under that Section.

2. Even if a "reasonableness" rule may be applied to qualify the right conferred by Section 2024(d), the three-year leave requested by "Sky" King was not unreasonable. Proper deference to the judgment of military authorities should preclude a court from

holding unreasonable the *duration* of a requested leave to serve under a bona fide military order. Moreover, proper deference to congressional judgment in establishing the AGR program requires that a tour of duty to serve in that program be protected under Section 2024(d). Finally, and especially in view of the protection of longer tours of duty under other provisions of the VRRA, three years is not an unduly long period for a requested leave under Section 2024 (d) of that Act.

ARGUMENT

I. SECTION 2024(d) OF THE VETERANS' REEMPLOYMENT RIGHTS ACT DOES NOT CONDITION THE RIGHT TO A LEAVE OF ABSENCE ON THE REASONABLENESS OF THE REQUEST FOR LEAVE

A. A Reasonableness Requirement Is Contrary To The Plain Language Of Section 2024(d) And Negates Its Core Purpose

1. Section 2024(d) is written in broad and unqualified terms. It mandates that leave for reserve duty covered by that Section "shall upon request be granted," and that Reservists "shall be permitted to return to [the] position[s]" they would have occupied "had [they] not been absent for such purposes." As the Fourth Circuit recently observed, the language of Section 2024(d) is "unequivocal and unqualified." *Kolkhorst* v. *Tilghman*, 897 F.2d 1282, 1286 (1990), petition for cert. pending, No. 89-1949; see also *Monroe* v. *Standard Oil Co.*, 452 U.S. at 553 n.7 ("[Section 2024(d)] *compels* employers to grant leaves of absence to employees who must attend reserve training") (emphasis added). And, as the Third Circuit noted, "[Section] 2024(d) does not contain on its

face any limitation of the duration of the leave of a reservist for the purpose of carrying out duty for training." *Eidukonis* v. *Southeastern Pennsylvania Transp. Auth.*, 873 F.2d 688, 693 (1989). See also *Cronin* v. *Police Dep't*, 675 F. Supp. 847, 850 (S.D. N.Y. 1987) ("[Section] 2024(d) contains no express limitation with respect to the duration of protected military leave for training."). There can be no doubt, then, that the language of Section 2024(d) imposes no durational limit, nor any qualification of any kind, upon the right of a Reservist who requests leave to return to his civilian job after taking that leave.

2. Despite the clear terms of Section 2024(d), the Eleventh Circuit engrafted a reasonableness requirement into the statute, holding that a Reservist has no right to return to his job unless the requested leave is "reasonable." Pet. App. 9a-11a. Not only does that construction of Section 2024(d) flout the language of Section 2024(d), but, by qualifying the unqualified rights protected by that Section, the court of appeals has dramatically curtailed the reemployment rights of Reservists serving tours of duty that clearly fall within its scope.

The main principle underlying the VRRA is that no person should suffer a penalty in his civilian job by reason of his absence from that job to fulfill his obligations as a member of the Armed Forces. See *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946); *Tilton* v. *Missouri P. R.R.*, 376 U.S. 169, 170-171 (1964); *Accardi* v. *Pennsylvania R.R.*, 383 U.S. 225, 228 (1966). The VRRA "clearly manifests a purpose and desire on the part of the Congress to provide as nearly as possible that persons * * * upon returning to civilian life, resume their old employment without any loss because of

their service to their country." *Ibid.* Indeed, this Court has stated that the judicial branch must give "as liberal a construction for the benefit of the veteran [to each separate provision of the VRRA] as a harmonious interplay of the separate provisions permits." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. at 285. See also *Coffy* v. *Republic Steel Corp.*, 447 U.S. 191, 196 (1980); *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 584 (1977). Especially in light of this Court's repeated admonition that the reemployment rights provisions are "to be liberally construed for the benefit of those who * * * serve their country," *Fishfold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. at 285, no judicial qualification should be imposed on the reemployment rights conferred by the statute as written.

3. When Congress adopted Section 2024(d), this Court had firmly established the doctrine of liberally construing the VRRA for the benefit of the veteran. Thus, Congress was on notice that any limitations or conditions upon the rights granted to veterans must be explicit. See *McNary* v. *Haitian Refugee Center, Inc.*, No. 89-1332 (Feb. 20, 1991), slip op. 16 ("Congress legislates with knowledge of our basic rules of statutory construction."). Yet, in Section 2024(d), no condition (other than that of a "request") was imposed.[13] Rather, as the Court pointed out in *Monroe* v. *Standard Oil Co.*, Congress carefully struck the desired balance between the rights of Reservists and the needs of employers in the express terms of Section 2024(d). See 452 U.S. at 564 ("[A] 'reasonable accommodation' to employee-reservists because of missed worktime has already been made by Congress in § 2024(d). There, Congress decided what allowance employers should make to reservists whose duties force them to miss time at work: provide them a leave of absence.").

[13] The requirement that an employee-reservist "request" leave from his employer has been construed by several courts of appeals to impose a condition of timely and adequate notice to the employer of the employee's impending need for leave. See, *e.g.*, *Sawyer* v. *Swift & Co.*, 836 F.2d 1257, 1260-1261 (10th Cir. 1988) (Section 2024(d) does not forbid an employer to require "adequate" notice of impending leave); *Burkart* v. *Post-Browning, Inc.*, 859 F.2d 1245, 1247-1248 (6th Cir. 1988) (suggesting same); *Ellermets* v. *Department of the Army*, 916 F.2d 702 (Fed. Cir. 1990) (under Section 2024(d), Reservist must inform his superiors *before* he departs for leave). The question whether such a condition is imposed by the statute is not presented in this case, since respondent here has not claimed, and the courts below did not suggest, that the notice given by petitioner was inadequate. But we note that the statutory requirement of a "request" does appear to embrace some notion of timely notice, since it is difficult to believe that Congress mandated a "request" as an empty gesture. Even if an employer may not refuse on the ground that the request is "unreasonable," the requirement that the employee "request" leave can serve important purposes. It allows an employer to take some advance action to compensate for the employee's absence and, in some instances, to see whether the employee himself can make alternative arrangements.

Moreover, Congress knew how to impose durational limits on reemployment protections for members of the Armed Forces, and did so in other sections of the VRRA. A Reservist who enters on active duty or enlists in the Armed Forces proper ordinarily retains the right to return to his previous job, or a similar position, for at least four years. See 38 U.S.C. 2024(a) (enlistees); 38 U.S.C. 2024(b)(1) (tour of active duty).[14] The provision that applies to

[14] Under some circumstances, Reservists on "active duty" can retain their reemployment rights without any durational

Reservists who serve on active duty as part of a limited call-up by the President under 10 U.S.C. 673b (as occurred at the start of Operation Desert Shield) protects reemployment rights for the duration of service on "active duty for not more than 90 days." 38 U.S.C. 2024(g).[15] In contrast, the Act places no express time limits on reemployment rights for persons drafted into the Armed Forces, see 38 U.S.C. 2021(a), or engaged in initial active duty for train-

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limit for a period of extension of active duty by the military beyond four years. See 38 U.S.C. 2024(a); 38 U.S.C. 2024 (b)(1). See also Section 2024(b)(2).

[15] Although Section 2024(g) refers to 90-day tours of duty, Section 673b of Title 10 has, since 1976, allowed the President to extend tours under that Section for up to 180 days. See 10 U.S.C. 673b (permitting the President to call 200,000 Reservists to duty for 90 days, subject to a 90 day extension). The disparity raises the question whether Section 2024(d) guarantees reemployment to Reservists originally deployed in the Persian Gulf under Section 673b for 180 days. This potential problem was solved by a retroactive amendment to Section 2024(g) that strikes out the reference to 90 days, thereby removing any durational limit on VRRA coverage for involuntary duty under Section 673b. See Pub. L. No. 102-12, § 8, 105 Stat. 34.

Also, on January 18, 1991, President Bush issued Exec. Order No. 12,743, which declared that Reservists originally called up on the authority of Section 673b would henceforth be considered mobilized under 10 U.S.C. 673(a) allowing the President to call 1,000,000 members of the Ready Reserve to active duty (other than for training) for 24 months "[i]n time of National emergency declared by the President * * * or when otherwise authorized by law". Reservists called to active duty under Section 673 (as opposed to 673b) enjoy reemployment rights under 38 U.S.C. 2024(b)(1) and (2), which impose no durational limit as long as the President's call-up order is in effect and the individual Reservist has not been issued orders relieving him from active duty.

ing, see 38 U.S.C. 2024(c) (although the duration of such training is fixed by statute, see note 6, *supra*). In the same vein, the Act says nothing about the duration of training duty that is entitled to protection under 2024(d).

"Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983); *General Motors Corp.* v. *United States*, 110 S. Ct. 2528 (1990); *Gozlon-Peretz* v. *United States*, No. 89-7370 (Feb. 19, 1991), slip. op. 8-9. Here, Congress has chosen within the same statute to place time limits on reemployment rights with respect to some kinds of service, but not others. It follows that if Congress had wanted Reservists engaged in "active duty for training" to enjoy reemployment rights for a limited time only, or to qualify for reemployment rights only under limited circumstances, "it could have [said] so expressly." Cf., *Monroe* v. *Standard Oil Co.*, 452 U.S. at 564 (Court will not impose a "reasonable accommodation" requirement under the antidiscrimination provision of Section 2021(b)(3) of the VRRA, since Congress "could have done so expressly," but did not).

Moreover, the limits Congress has imposed are simple and unambiguous, providing both Reservist and employer with clear notice of their respective rights and responsibilities. Congress has chosen not to incorporate a multi-factor balancing test, complete with indeterminate criteria that inevitably generate uncertainty and apprehension. Congress's considered choice—whether wise or not—was much simpler, more straightforward, and easier to apply. Courts

therefore do violence to Congress's ordained scheme by redrafting the statute to include such criteria. See *Monroe* v. *Standard Oil Co.*, 452 U.S. at 565 ("If Congress desires to amend § 2021(b)(3) [to include a reasonable accommodation requirement], it is free to do so. But we must deal with the law as it is.").

4. Reading a "reasonableness" requirement, or a durational limit, into Section 2024(d) directly frustrates the statutory purpose. In enacting the reemployment rights provisions of the VRRA, Congress sought not only to boost morale and to provide an important benefit to those who serve their country, but also to create an effective tool for encouraging service in the Armed Forces. See *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 583 (1977) (the VRRA "provides the mechanism for manning the Armed Forces of the United States."); *Carter* v. *United States*, 407 F.2d 1238, 1243 (D.C. Cir. 1968). By conferring clearcut and unqualified rights to reemployment without penalty following training or other duty coming within its scope, Section 2024(d) removes one of the most important disincentives to voluntary service in the Reserves—the fear that such service comes at the price of loss of livelihood.

Changes in defense policy within the last generation have dramatically transformed the role of the Reserve components, but at the same time have increased the difficulty of maintaining a sizeable and properly trained Reserve force. Because of the Nation's heavy reliance, as part of the Total Force concept, on the Reserve forces as a key component of the Nation's armed services, significant curtailment of the protections afforded Reservists under Section 2024(d) would have an especially adverse impact on military preparedness.

a. Following abolition of the draft in the early 1970s and the creation of an all-volunteer force, see *The AGR Program*, 106 Mil. L. Rev. at 7, the willingness of citizens to volunteer for service in all components of the Armed Forces—including the Reserves—became critical to the strength and integrity of the fighting force. In the wake of the draft's demise, then Secretary of Defense Melvin Laird articulated a "Total Force Policy" that was formally adopted by the DOD in 1973. That Policy had as its objective "to maintain as small an active peacetime force as national security policy, military strategy, and overseas commitments permit, and to integrate the capabilities and strength of the active and reserve forces in a cost-effective manner." *1990 DOD Report to Congress, supra*, at 13. Instead of merely serving as an emergency manpower source, the "Ready Reserve" became an integral part of the Armed Forces of the United States. See *The AGR Program*, 106 Mil. L. Rev. at 5-7. See also H.R. Rep. No. 504, 99th Cong., 2d Sess. 2 (1986) ("Under the Total Force Policy, the Reserve components [are used] * * * as the initial and primary augmentation of the active forces in the event of mobilization. In many instances, the active forces would be unable to deploy and accomplish their mission without National Guard and Reserve augmentation."). Over the last 20 years, the Ready Reserve units have come to provide about one-half of the Army's combat power and two-thirds of its combat service support and wartime medical capability. *Ibid.*[16]

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[16] See also H.R. Rep. No. 1069, 94th Cong., 2d Sess. 3-5 (1976) (reserve components have become co-equal partners with the active forces in the national defense); H.R. Rep. No. 107, 98th Cong., 1st Sess. 202 (1983) (commenting on

These changes in policy required a dramatic increase in the size of the service forces. But, as the military services became dependent on citizen volunteers, reserve recruiting and retention declined. See *The AGR Program*, 106 Mil. L. Rev. at 7.[17] And as Reservists became harder to recruit, "the nature of the Reserve mission * * * changed." The Department of Defense attempted to replace a modest-sized force capable only of "slow-moving general mobilization" with a large, well-trained, battle-ready reserve force "immediately available to augment active duty personnel in important front-line duty." See *The AGR Program*, 106 Mil. L. Rev. at 6; see also DOD, *Annual Report of the Secretary of Defense on Reserve Forces*, Fiscal Year 1975, at 1 (1976).

This transformation necessitated more rigorous and sophisticated training for members of the National Guard and the Ready Reserve. Reservists need extensive training to be fully prepared to play their crucial military role on short notice alongside the regular forces. See H.R. Rep. No. 504, 99th Cong., 2d Sess. 2 (1986) (to fulfill mission requirements, Ready Reserve personnel "must have the opportunity for meaningful and realistic training"); *The AGR Program*, 106 Mil. L. Rev. at 7 (increased reliance "demanded fully trained and disciplined Reserves").

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the role of Reserves in the Total Force); *The AGR Program*, 106 Mil. L. Rev. at 6-7; *1990 DOD Report to Congress*, at 21 (in 1950, 51% of Army military manpower, and 27% of Air Force military manpower were found in the reserve components).

[17] Every annual report by the Secretary of Defense throughout the 1970s noted a major problem in maintaining a sufficient number of Reservists, and attributed the difficulty principally to the elimination of the draft, which had provided a major incentive for joining the Reserves. See 106 Mil. L. Rev. at 8 & nn. 36-38.

The need for more intensive and elaborate training was also compounded by the Armed Forces' growing dependence on advanced technology, in both its weaponry and support capabilities. Many of the modern skills necessary to operate complex weaponry, computers, and support equipment cannot be learned by a Reservist over a weekend or in fourteen days. As the training programs have proliferated in number and complexity, they have also increased in length, requiring a greater time commitment.[18]

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[18] During fiscal years 1989 and 1990, more than 21,000 members of the Federal Reserve and National Guard components, in addition to those enrolled in the AGR Program, served on tours of "active duty for training" of 180 days or more. See *Manpower Requirements Report*, DOD 1991 Fiscal Year, at III-55, IV-55, IV-49, and VI-43, 44; *Manpower Requirements Report*, DOD 1992 Fiscal Year, at II-53, IV-49, 50, V-29, VI-40.

The following is a sample of training tours available during Fiscal Year 1991 that are open to members of the National Guard and Federal Reserve components and that require substantial commitments of time: C-141 Pilot (104 weeks); Officer Sea Air Mariners (104 weeks); Cryptologic Technician Interpreter (79 weeks); C-5 Basic Flight Engineer (53 weeks); Electronic Warfare/Intercept Aviation System Repairer (50 weeks); Hawk (surface to air missile) Field Maintenance Equipment/Pulse Acquisition Radar Repairer (54 weeks); Hawk Firing Section Repairer (36 weeks); Hawk Fire Control Repairer (54 weeks); Medical Equipment Repairer (46 weeks); Fire Controlman (43 weeks); Voice Interceptor (43-90 weeks). See also *Gulf States*, 811 F.2d at 1466 (leave requested under Section 2024(d) to enroll in a one-year training program sponsored by the Army Reserve in response to an acute shortage of nurses); *Eidukonis*, 873 F.2d at 690-692 (leave requested under Section 2024(d) to participate in weapons firing range computer

As the reserve components grew in importance and complexity, it also became clear in the late 1970s that a cadre of "full-time support" personnel was needed to train reserve units and administer the reserve program. After unsatisfactory attempts to answer the full-time training support needs with civilian "military technicians," and because statutory impediments restricted the use of full-time active military personnel to support the Reserves, see *The AGR Program*, 106 Mil. L. Rev. at 9-10, Congress decided to establish the AGR Program in order to supply the necessary full-time training support.[19]

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project); *Kolkhorst* v. *Tilghman*, 897 F.2d at 1285 n.* (citing cases involving training leaves of longer duration).

Reservists ordinarily train in these protracted programs under orders issued on the authority of 10 U.S.C. 672(d), which permits any Reservist to be called to active duty indefinitely with his or her consent. The term "active duty" in Section 672(d) includes "active duty for training" as that term is used in Section 2024(d). See Report of the Committee on the Judiciary, S. Rep. No. 2484, 84th Cong., 2d Sess. 55 (1956).

[19] The Department of Defense Authorization Act of 1980, Pub. L. No. 96-107, Tit. IV, § 401(b), 93 Stat. 807 granted authority to employ a specified number of Reservists "to be serving on full-time active duty for the purpose of organizing, administering, recruiting, instructing, or training the reserve components." See also H.R. Rep. No. 166, 96th Cong., 1st Sess. 121 (1979) ("For the first time * * * there is a seperate [*sic*] authorization for reserve component members serving on full-time active duty for the purposes of organizing, administering, recruiting, instructing, or training the reserve forces.").

Every year since 1980, Congress has continued to reauthorize full-time AGR personnel from components of the Ready Reserves, including the Army and Air National Guard of the United States, and the Army and Air Force Reserve. See

b. The "rule of reason" adopted by the court below, and similar tests adopted by other courts of appeals, jeopardize the reemployment rights of all Reservists serving in the AGR Program or undertaking lengthy periods of training for the benefit of the Reserves. By casting doubt on these Reservists' reemployment rights, the courts' decisions seriously threaten the ability of the Ready Reserve to fill pivotal positions requiring lengthy tours of "active duty for training."

The *ad hoc* and unpredictable nature of the "reasonableness" tests devised by these courts is reflected in the fact that no two tests are alike. See *Kolkhorst* v. *Tilghman*, 897 F.2d at 1285-1286 (noting that the "judicially created [reasonableness] standard" varies "from one jurisdiction to the next"); *Boyle* v. *Burke*, 925 F.2d 497 (1st Cir. 1991) (same). In determining whether a particular form of military leave is "reasonable," the tests vary widely in the factors considered relevant and the weight attached to them. See *e.g.*, *Eidukonis*, 873 F.2d at 695-696 (adopting a broader "reasonableness" inquiry into length of time requested, timing of the request, employee's good faith, the employer's particular need, the employer's ability to find a substitute, the additional costs that

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e.g., Department of Defense Authorization Act of 1984, Pub. L. No. 98-94, § 502, 97 Stat. 631; National Defense Authorization Act of 1991, Pub. L. No. 510, § 412(a), 104 Stat. 1547. As of September 30, 1990, there were almost 33,000 members of the Army and Air National Guard serving tours under 32 U.S.C. 502(f) in the AGR program. See *Biennial Budget Estimate, Fiscal Years 1992-1993, National Guard Personnel Army* at 95, *National Guard Personnel Air Force* at 518. See also Reserve Forces Policy Board, *DOD 1989 Annual Report;* 1A DOD, *Sixth Quadrennial Review of Military Comp.* 3-4 (1988).

would be borne by the employer, and whether the employer had a clear policy regarding leave requests); *Gulf States Paper* v. *Ingram*, 811 F.2d at 1469 (rejecting a "totality test," but holding that "reasonableness" must be judged on the basis of the length of the leave, the employee's actions, and the burden placed on the employer); *Lee* v. *City of Pensacola*, 634 F.2d 886, 889 (5th Cir. 1981) (stating that a "rule of reason" applies, without explaining what factors are to be considered, but examining the Reservist's other training options, the fact that he did not tell his employer about them, the timing of the request, and the burden placed on the employer).[20]

Under such vague standards, no Reservist can be sure if, or how long, his job will be protected, and no employer can know for certain whether it needs to hold a job open or to make other arrangements to comply with the requirements of Section 2024(d). Above all, the military may be unable to attract capable Reservists into its training and full-time support programs once Reservists realize that, absent a judicial decision that is binding in their circuit and that deals with their precise situation, there is no assurance that their jobs will be waiting when the period of service is complete. Reservists fearful of losing their civilian jobs would be effectively deterred from applying for many programs that provide sophisticated training, and the AGR program would

[20] See also *Anthony* v. *Basic American Foods, Inc.*, 600 F. Supp. 352, 355 (N.D. Cal. 1984) (in evaluating whether a leave request is reasonable the court should consider "1) the circumstances giving rise to the request and 2) the requirement of the employer"); *Lemmon* v. *Santa Cruz County*, 686 F. Supp. at 802 (modifying the *Lee* test, to examine five additional factors).

be hard pressed to attract the high caliber personnel it needs.[21] See Army Reg. 135-18, § 1-5 (1985).[22]

In contrast, reading Section 2024(d) to mean what it says yields a concrete, definitive right that an employee can rely upon when deciding whether to enlist in the Ready Reserve and, thereafter, whether to enroll in an extended training program. Both employee and employer will know that as long as the employee's training orders are properly authorized, the employee has the right to return to his job. Thus, this more natural construction of Section 2024(d) supplies

[21] See the Affidavit of Colonel Raymond Albertella, Chief of the Army Manpower Division of the National Guard Bureau, submitted to the district court, in which he attested that "denial of reemployment rights for AGR soldiers would have a significant, adverse impact on the ability of personnel managers to attract quality soldiers, in sufficient numbers required." R1-37-2.

[22] Congress has recently stressed the connection between military preparedness and reemployment rights. In a 1986 Joint Resolution, Congress found that "the National Guard and Reserve forces of the United States are an integral part of the total force policy of the United States for national defense." It further found that "attracting and retaining sufficient numbers of qualified persons to serve in the Guard and Reserve is a difficult challenge" and, consequently, "the support of employers and supervisors in granting employees a leave of absence from their jobs to participate in military training without detriment to earned vacation time, promotions, and job benefits is essential to the maintenance of a strong Guard and Reserve force." Act of May 2, 1986, Pub. L. No. 99-290, § 1(a), 100 Stat. 413. Congress called upon "employers and supervisors of employees who are members of the National Guard or Reserve to abide by the provisions of chapter 43 of title 38, United States Code." Pub. L. No. 99-290, § 1(c), 100 Stat. 413. See also, H.R. Rep. No. 504, 99th Cong., 2d Sess. 2 (1986).

what Congress was seeking in the first instance—reliable job protection that facilitates recruitment of high quality personnel and allows Reservists to be adequately trained to fulfill their critical role in safeguarding our national defense.

B. Nothing In The History Or Evolution Of Section 2024(d) Warrants Departure From Its Terms, Which Unequivocally Protect The Reemployment Rights Of Reservists In Petitioner's Position

1. "Going behind the plain language of a statute in search of a possibly contrary congressional intent is a step to be taken cautiously even under the best of circumstances." *United States* v. *Locke*, 471 U.S. 84, 95-96 (1985) (internal quotes omitted); *Demarest* v. *Manspeaker*, 111 S. Ct. 599, 604 (1991). Here, the statutory text is clear and unambiguous; therefore, "judicial inquiry is complete," and resort to legislative history is unnecessary. *Burlington N.R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987). Even so, we can find nothing in the legislative history of the VRRA generally or of Section 2024(d) in particular that lends any support to a reasonableness test or that warrants an interpretation at odds with the text itself.

As noted above, the provision later recodified at 38 U.S.C. 2024(d) was enacted in 1960 as an amendment to Section 9(g) of the Military Training and Service Act, 50 U.S.C. App. 459 *et seq.* In place of Section 9(g)(3), which granted leaves of absence for the purpose of "performing training duty," see pp. 5 & note 5 *supra*, the 1960 enactment substituted two sections: one (later Section 2024(c)) covered initial active duty training and required return to work within 31 days after release from duty; the other (later Section 2024(d)) covered "active duty for

training or inactive duty training," and required return to work immediately after training. See Act of July 12, 1960, Pub. L. No. 86-632, 74 Stat. 467; H.R. Rep. No. 1263, *supra*, at 8-9 (reprinting old and new law).

This enactment had two principal stated goals, neither of which involved any limitations, durational or otherwise, on leaves of absence under the provision at issue in this case. First, in the provision later codified at 38 U.S.C. 2024(c), the enactment extended to members of the National Guard the same reemployment protection enjoyed by other Reservists who were called to perform "an initial period of active duty for training of 3 to 6 months." S. Rep. No. 1672, 86th Cong., 2d Sess. 1-2 (1960). Second, the enactment was designed to "adjust the time period within which leave of absence rights must be asserted" after the performance of training duty other than initial training covered by Section 2024(c). S. Rep. No. 1672, *supra*, at 1. See also H.R. Rep. No. 1263, *supra*, at 2 (1960). Accordingly, Congress incorporated into the progenitor of Section 2024(d) the requirement that, to qualify for protection, Reservists returning from "active duty for training or inactive duty training" must return to work "at the beginning of the next regularly scheduled working period." H.R. Rep. No. 1263, *supra*, at 2-3. Apart from this requirement, and that of a "request" to the employer for leave, that Section placed no conditions or limits on the assertion of reemployment rights following a tour of duty falling within its scope.

The 1960 Senate Report on Section 2024(d) states that it provides protection for trainees who are absent from employment for short periods, "such as" two-hour drills, weekend drills; two-week annual encampments, or special training or instruction periods

lasting for 30, 60, or 90 days. S. Rep. No. 1672, *supra*, at 2. See also H.R. Rep. No. 1263, *supra*, at 6 (amendments to Section 9(g) provide "job protection and reemployment rights that apply to all military trainees not previously covered"—that is, "individuals on active duty training under orders which contemplate service of less than 3 months and all other training duty, active or inactive, for lesser periods of time"). At least one court of appeals has relied in part on this commentary to construe Section 2024(d) as imposing a requirement that any military leave requested be reasonable. See *Eidukonus* v. *Southeastern Pennsylvania Transp. Auth.*, 873 F.2d at 693. However, these remarks in the legislative history do not support that conclusion. See *Kolkhorst* v. *Tilghman*, 897 F.2d at 1286.

At the time Section 2024(d) was enacted, members of the "Ready Reserve" had only short and intermittent training obligations, such as those described in the Senate Report.[23] The comments in the

[23] The 1960 Senate Report's examples of the range of training duty obligations that existed at that time may have been the source of the Court's dictum in *Monroe* that Section 2024(d) "was enacted in 1960 to deal with problems faced by employees who had military training obligations lasting less than three months." 452 U.S. at 555. Alternatively, this remark may have been based on the terms of a different provision, 38 U.S.C. 2024(c), that protects reservists during their initial active duty for training, which lasts a minimum of 12 weeks. At any rate, *Monroe*'s observation is of limited significance to the interpretation of Section 2024(d), as the statement was made in the course of the Court's ruling on the meaning of an entirely different section of the statute, Section 2021(b)(3). The Court did not discuss, and gave no consideration to, the various types of training falling

congressional reports regarding weekend and two-week training drills therefore simply reflect the range of training requirements in place at the time, and do not impose substantive limitations on the coverage of Section 2024(d). Indeed, a careful examination of the legislative remarks reveals that the instances of existing training obligations supplied in the Reports were designed to illustrate the broad category protected by the new provision—which was to include "all military trainees not previously covered," see H.R. Rep. No. 1263, *supra*, at 6. See, *e.g.*, *Cronin* v. *Police Dep't*, 675 F. Supp. at 850 n.3 (the phrase "such as," used in the Senate Report, "is not a phrase of strict limitation"); *Barber* v. *Gulf Publishing Co.*, 103 Lab. Cas (CCH) ¶ 11,676, at 24,862 n.5 (S.D. Miss. 1986) (determining, on similar analysis, that Section 2024(d) does not exclude training lasting more than 90 days). Thus, Congress's discussion of the training periods prevalent in 1960 does not circumscribe the applicability of Section 2024(d), nor does it prevent the military from adapting to changing needs by creating longer tours of "active duty for training." In any case, the House and Senate Reports provide no support for the existence of a vague and open-ended requirement that the request for leave be "reasonable."

To be sure, most Ready Reservists invoke the protections of Section 2024(d) for periods of training shorter than that involved here—ordinarily, one weekend of inactive duty training per month and 12 days of active duty training per year. But it does not follow that Congress intended Reservists on short-term training to be the *exclusive* beneficiaries. To the contrary, that provision squarely covers less

within the scope of Section 2024(d) that might require significantly longer time commitments.

common, or even unanticipated situations, since it embodies Congress's determination that the Section applies without regard to the length of the leave or other factors that would take away the job security of the reservists who come within its terms.[24] See *Board of Governors* v. *Dimension Fin. Corp.*, 474 U.S. 361, 371 (1986) (Congress's choice of general language demonstrates that, although "legislation may have been prompted by the needs" of specific members of a class, "Congress intended to [cover] the class.").

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[24] The long-standing position of the Secretary of Labor, who administers the VRRA (see 38 U.S.C. 2002A(b)(1), 2025), has been that Section 2024(d) requires an employer to grant leave and to reemploy the Reservist in his previous job when he is released from duty, without any time and reasonableness limitations. See U.S. Dep't of Labor, *Veterans' Reemployment Rights Handbook* 111 (1970). Congress relied upon the Secretary's established interpretation of Section 2024(d) in describing veterans' reemployment rights. See *e.g.*, S. Rep. No. 1477, 90th Cong., 2d Sess. (1968) (containing charts indicating that there is no maximum period of service applicable to "reemployment rights and job protection" for Reservists engaged in "active duty for training or inactive duty training (drills)"); H.R. Rep. No. 1303, 90th Cong., 2d Sess. 6 (1968) (same).

When in 1981, the Secretary temporarily adopted a different view following the Fifth Circuit's decision in *Lee* v. *City of Pensacola*, 634 F.2d 886 (1981), Congress reacted strongly and adopted a joint statement disapproving the Secretary's interpretation. Explanatory Statement of Compromise Agreement, 128 Cong. Rec. 25,513 (1982) (stating that durational limits on protections under Section 2024(d) are not "well-founded either as legislative interpretation or application of the pertinent case law.") The clarification by Congress resulted in the Secretary's reaffirmation of the original interpretation of Section 2024(d):

> [Section 2024(d)] imposes no limit on the number, frequency, or duration of the training duty periods for which the employee has reemployment rights protection. The need for such training is determined by the Armed Forces, and they also determine its frequency and duration. As long as the reservist or Guard member continues to receive the necessary orders, he continues to have statutory protection.

See *Veterans' Reemployment Rights Handbook* 18-2 (1988). See also *Monroe* v. *Standard Oil Co.*, 452 U.S. at 563 n.14 (citing the *Handbook* as authority on the construction of the VRRA); *Leib* v. *Georgia Pacific*, 925 F.2d 240, 245 (8th Cir. 1991), ~~slip op. 10~~ (citing cases holding that the *Veterans' Reemployment Rights Handbook* provides "informed guidance" regarding the VRRA).

2. Even if there were any question as to the intent of Congress when Section 2024(d) was enacted, there can be no doubt that Congress later deliberately extended the benefits of Section 2024(d) to Reservists serving in the AGR program, and did so as part of its emphasis on the importance of that program. In 1980, shortly after creation of the program, Congress amended 38 U.S.C. 2024(f) to provide that "full-time training or other full-time duty performed by a member of the National Guard under section * * * 502 * * * of title 32 is considered active duty for training" under Section 2024(d), and thus is entitled to the reemployment rights guaranteed by that Section. See Veterans' Rehabilitation and Education Amendments of 1980, Pub. L. No. 96-466, § 511(b), 94 Stat. 2207.[25] This amendment unambiguously

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[25] Because AGR personnel do not *receive* training, it was necessary to amend Section 2024(f) to deem AGR service "active duty for training." As explained in the House Report.

> Members of reserve components who are ordered to active duty for training are entitled to be reemployed by their private employers following their releases from that duty. Full-time training or duty by members of

provides that members of the National Guard who, like petitioners, serve in the AGR program on the authority of 32 U.S.C. 502(f), are entitled to the full

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the National Guard under Section 503-505 of title 32, U.S. Code, is treated like active duty for training for this purpose. *It is now possible to perform full-time training or duty under title 32, U.S. Code, section 502 as well as under sections 503-505.* In order to reflect this, section 502 should be added to the enumeration in section 2024(f) of title 38, U.S. Code. *This section would provide the same reemployment rights following periods of full-time training or duty under Title 32, U.S. Code, section 502, as current law provides following duty under Section 503-505 of title 32, U.S. Code.*

H.R. Rep. No. 498, 96th Cong., 1st Sess. 49 (1979) (emphasis added).

The 1980 amendment to Section 2024(f) extended the benefits of Section 2024(d) only to members of the National Guard serving in the AGR under 32 U.S.C. 502(f), because the reemployment rights of other Reservists in the AGR are protected under other provisions of Section 2024. Participants in the AGR Program may be ordered to duty under provisions of Title 32 or Title 10. See, *e.g.*, DOD Appropriation Act of 1980, Pub. L. No. 96-154. Tit. I, 93 Stat. 1141 (authorizing personnel to "serv[e] on active duty under section 672(d) of title 10 or section 502(f) of title 32, United States Code."). Reservists (including some National Guard members) enrolled in the AGR Program under Title 10 are considered to be on "active duty" under either 10 U.S.C. 265 or 10 U.S.C. 672(d), which entitles them to at least four years of reemployment protection under 38 U.S.C. 2024(b)—more than long enough to complete a three-year AGR tour.

Although petitioner was ordered to active duty under 10 U.S.C. 672(d) for a brief period at the beginning of his tour (during which he was required to leave the country), his orders to serve "full-time duty (State) in Active Guard Reserve status" were authorized under 32 U.S.C. 502(f), see Pet. App. 27a-28a, which governs service in the state National Guard. Because he was not called to duty under Title

reemployment protections of Section 2024(d) for the duration of their service. Moreover, in 1984, Congress specified the measure of veterans' rights and benefits available to full-time National Guard members, including those in AGR service,[25] and in doing so reaffirmed that National Guard members serving in the AGR program should receive full reemployment rights under 38 U.S.C. 2024(d).

10, he remained under the command and control of the state Adjutant General, whom he was assigned to assist. See The Active Guard Reserve Program, Army Reg. 135-18, § 3-1 (1985) (National Guard members in the AGR under 32 U.S.C. 502(f) (2) "serve in a state status.").

[26] Because National Guard members in the AGR Program under 32 U.S.C. 502(f) are serving in their state status, see Army Reg. 135-18, § 3-1(c) (1985) and note 25, *supra*, Guard members qualify only for veterans' benefits to the extent that Congress explicitly so provides.

In 1984, Congress once again specified that members of the National Guard on full-time duty, expressly including those serving under 32 U.S.C. 502 (see 32 U.S.C. 101(19) (1984)), are considered to be on "active duty for training" for purposes of reemployment rights. In a provision codified at 10 U.S.C. 3686 (1984), Congress provided that

> for the purposes of law providing benefits for members of the Army National Guard and their dependents and beneficiaries * * * full-time National Guard duty performed by a member of the Army National Guard of the United States shall be deemed to be active duty in the Federal service as a Reserve of the Army, *except that for purposes of Title 38, such duty shall be considered to be active duty for training.*

(emphasis added).

C. The Courts Should Defer To The Decisions Of Congress And The Executive Branch As To Which Tours Should Be Considered "Active Duty For Training" Entitled To Full Reemployment Rights Protection Under Section 2024(d)

As explained in *Monroe* v. *Standard Oil, Inc.*, 452 U.S. at 565, the courts "do[] not sit to draw the most appropriate balance between benefits to employee-reservists and costs to employers. That is the responsibility of Congress." In the present case, Congress has performed that calculus by authorizing full-time support duty in the form of the AGR Program, and by expressly providing that members of the National Guard who undertake such duty shall be considered to be on "active duty for training" entitled to the protections of Section 2024(d). In addition, Congress and the Military have devised new training programs, have decided how long such training programs should last, and have determined how much training is "reasonable." By authorizing new bona fide forms of "active duty for training," the Executive and Legislative Branches have decided that Reservists who undertake such training deserve to have their jobs protected. That should be the end of the matter.

This Court's cases teach that the Judicial Branch should be especially chary of interfering with the exercise of legislative or executive authority over military affairs. See, *e.g.*, *Chappell* v. *Wallace*, 462 U.S. 296, 301 (1983); *Rostker* v. *Goldberg*, 453 U.S. 57, 64-65 (1981). As the Court stated in *Gilligan* v. *Morgan*, 413 U.S. 1 (1973), "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and

Executive Branches." *Id.* at 10 (emphasis omitted). Thus, the courts should not question the reasonableness of the length or nature of the military leave for training, so long as the leave is supported by properly issued bona fide military orders. See *Cronin* v. *Police Dep't*, 675 F. Supp. at 854 ("the type, duration and frequency of any particular course of military training must also be presumed reasonable").[27]

II. EVEN IF A REASONABLENESS TEST APPLIES, PETITIONER'S REQUEST FOR LEAVE TO SERVE IN THE AGR PROGRAM WAS REASONABLE

To the extent any "reasonableness" rule may be applied to qualify the right conferred by Section 2024(d), we submit that the three-year military leave in the present case was not unreasonable.[28] First, the courts should never deem unreasonable the *duration*

[27] This is not to say that an employee has *carte blanche* to take unlimited and repeated leaves for training, since only leaves that the military deems necessary will be protected. Although some of the training sessions can run successively and others, especially those for highly technical positions, see note 18, *supra*, may be extended for good reason by military authorities, such extensions would end when the Reservist had acquired the necessary skills or when the goals of the training had been met.

[28] The broad question stated in our petition for certiorari and in this brief is whether an employee's right to a leave of absence under Section 2024(d) "is conditioned on the 'reasonableness' of the employee's request for leave," and the discussion in this part of our brief addresses the narrower question whether, if such a condition may *ever* be imposed, the court below properly concluded that the request in this case was unreasonable. We believe, however, that this narrower question is fairly embraced within the more general issue of the existence and scope of any requirement of reasonableness.

of leave to serve pursuant to a bona fide military order. In evaluating reasonableness, the courts should defer to the professional military judgment concerning training and other needs of the Armed Forces, and should presume that the specific orders issued serve the national interest. See *Gilligan* v. *Morgan*, 413 U.S. at 10. Since the district court in this case found that petitioner's military leave request was not "unreasonable" apart from its duration (see Pet. App. 20a-21a), this Court should reverse the decision below.[29]

Second, this Court should defer to the unambiguous and specific congressional judgment that a National Guard member's multi-year tour to serve in the AGR program must be protected under Section 2024(d). As discussed above, p. 8 & note 10, at the time Congress created the AGR Program, the civilian technicians performing support functions were serving three-year tours. See *Lemmon* v. *Santa Cruz County*, 686 F. Supp. at 798. Knowing of these multi-year tours of duty, Congress amended the law to extend to members of the National Guard in the AGR unqualified rights to reemployment under Section 2024(d). Since Congress therefore effectively decided that tours lasting three years fall within the scope of the statute,

[29] In evaluating the effects of granting petitioner a three-year leave, the district court cited the deposition testimony of respondent's vice-president of human resources, explaining that an interim manager filling petitioner's position (manager of the hospital's security department) would not be comfortable enough to work effectively knowing that petitioner could return to the job after three years. Pet. App. 21a-22a n.9. However, the court's assessment of adverse impact on the employer should not be permitted to outweigh the military's determination as to the appropriate length of service in a Reserve position.

petitioner's three-year leave request should not be considered unreasonable.

Finally, three years is not an unreasonably long period for VRRA protection. A person who volunteers for regular military service is covered by the VRRA (without any qualifications) for four years, with extensions to five years or longer under certain circumstances. See 38 U.S.C. 2024(a). Moreover, members of the National Guard and the Federal Reserve components serving in the AGR program in a purely federal capacity under Title 10 U.S.C. are guaranteed reemployment rights for at least four years under 38 U.S.C. 2024(b). See note 25, *supra*. Reading a durational limit of less than three years into Section 2024(d), as did the court of appeals here, would create the anomaly of providing full job protection for Reservists serving in the AGR program under Title 10, but according no protection whatever to members of the National Guard performing the same functions on orders issued under Title 32. It is difficult to believe that Congress could have intended such drastically different treatment for members of different reserve components playing the same role. If some Reservists in the AGR program are covered for at least four years, it cannot be unreasonable to provide job protection for a member of the National Guard serving in the AGR program for three years.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Section 502 (32 U.S.C.) (1988) provides, in pertinent part as follows:

> Required drills and field exercises
>
> * * * * *
>
> (f) Under regulations to be prescribed by the Secretary of the Army or Secretary of the Air Force, as the case may be, a member of the National Guard may—
>
> (1) without his consent, but with the pay and allowances provided by law; or
>
> (2) with his consent, either with or without pay and allowances;
>
> be ordered to perform training or other duty in addition to that prescribed under subsection (a). Duty without pay shall be considered for all purposes as if it were duty with pay.

Section 2024 (38 U.S.C.) (1988) of the Veterans' Reemployment Rights Act provides as follows:

> Rights of persons who enlist or are called to active duty; Reserves
>
> (a) Any person who, after entering the employment on the basis of which such person claims restoration or reemployment, enlists in the Armed Forces of the United States (other than in a Reserve component) shall be entitled upon release from service under honorable conditions to all of the reemployment rights and other benefits provided for by this section in the case of persons inducted under the provisions of the Military Selective Service Act (or prior or

subsequent legislation providing for the involuntary induction of persons into the Armed Forces), if the total of such person's service performed between June 24, 1948, and August 1, 1961, did not exceed four years, and the total of any service, additional or otherwise, performed by such person after August 1, 1961, does not exceed five years, and if the service in excess of four years after August 1, 1961, is at the request and for the convenience of the Federal Government (plus in each case any period of additional service imposed pursuant to law).

(b)(1) Any person who, after entering the employment on the basis of which such person claims restoration or reemployment, enters upon active duty (other than for the purpose of determining physical fitness and other than for training), whether or not voluntarily, in the Armed Forces of the United States or the Public Health Service in response to an order or call to active duty shall, upon such person's relief from active duty under honorable conditions, be entitled to all of the reemployment rights and benefits provided for by this chapter in the case of persons inducted under the provisions of the Military Selective Service Act (or prior, or subsequent legislation providing for the involuntary induction of persons into the Armed Forces), if the total of such active duty performed between June 24, 1948, and August 1, 1961, did not exceed four years, and the total of any such active duty, additional or otherwise, performed after August 1, 1961, does not exceed four years (plus in each case any additional period in which such person was unable to obtain orders relieving such person from active duty).

(2) Any member of a Reserve component of the Armed Forces of the United States who voluntarily or involuntarily enters upon active duty (other than for the purpose of determining physical fitness and other than for training) or whose active duty is voluntarily or involuntarily extended during a period when the President is authorized to order units of the Ready Reserve or members of a Reserve component to active duty shall have the service limitation governing eligibility for reemployment rights under subsection (b)(1) of this section extended by such member's period of such active duty, but not to exceed that period of active duty to which the President is authorized to order units of the Ready Reserve or members of a Reserve component. With respect to a member who voluntarily enters upon active duty or whose active duty is voluntarily extended, the provisions of this subsection shall apply only when such additional active duty is at the request and for the convenience of the Federal Government.

(c) Any member of a Reserve component of the Armed Forces of the United States who is ordered to an initial period of active duty for training of not less than twelve consecutive weeks shall, upon application for reemployment within thirty-one days after (1) such member's release from such active duty for training after satisfactory service, or (2) such member's discharge from hospitalization incident to such active duty for training, or one year after such member's scheduled release from such training, whichever is earlier, be entitled to all reemployment rights and benefits provided by this chapter for persons inducted under the provisions of the Military Selective Service Act (or prior or

subsequent legislation providing for the involuntary induction of persons into the Armed Forces), except that (A) any person restored to or employed in a position in accordance with the provisions of this subsection shall not be discharged from such position without cause within six months after that restoration, and (B) no reemployment rights granted by this subsection shall entitle any person to retention, preference, or displacement rights over any veteran with a superior claim under those provisions of title 5 relating to veterans and other preference eligibles.

(d) Any employee not covered by subsection (c) of this section who holds a position described in clause (A) or (B) of section 2021(a) shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training, or upon such employee's discharge from hospitalization incident to that training, such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes. Such employee shall report for work at the beginning of the next regularly scheduled working period after expiration of the last calendar day necessary to travel from the place of training to the place of employment following such employee's release, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control. Failure to report for work at such next regularly sched-

uled working period shall make the employee subject to the conduct rules of the employer pertaining to explanations and discipline with respect to absence from scheduled work. If such an employee is hospitalized incident to active duty for training or inactive duty training, such employee shall be required to report for work at the beginning of the next regularly scheduled work period after expiration of the time necessary to travel from the place of discharge from hospitalization to the place of employment, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control, or within one year after such employee's release from active duty for training or inactive duty training, whichever is earlier. If an employee covered by this subsection is not qualified to perform the duties of such employee's position by reason of disability sustained during active duty for training or inactive duty training, but is qualified to perform the duties of any other position in the employ of the employer or such employer's successor in interest, such employee shall be offered employment and, if such person so requests, be employed by that employer or such employer's successor in interest in such other position the duties of which such employee is qualified to perform as will provide such employee like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such employee's case.

(e) Any employee not covered by subsection (c) of this section who holds a position, described in clause (A) or (B) of section 2021(a) shall be considered as having been on leave of absence during the period required to report for the purpose of being inducted into, entering, or

determining, by a preinduction or other examination, physical fitness to enter the Armed Forces. Upon such employee's rejection, upon completion of such employee's preinduction or other examination, or upon such employee's discharge from hospitalization incident to such rejection or examination, such employee shall be permitted to return to such employee's position in accordance with the provisions of subsection (d) of this section.

(f) For the purposes of subsection (c) and (d) of this section, full-time training or other full-time duty performed by a member of the National Guard under section 316, 502, 503, 504, or 505 of title 32 is considered active duty for training. For the purposes of subsection (d) of this section, inactive duty training performed by that member under section 502 of title 32 or section 206, 301, 309, 402, or 1002 of title 37 is considered inactive duty training.

(g) Any member of a Reserve component of the Armed Forces of the United States who is ordered to active duty for not more than 90 days under section 673b of title 10, United States Code, whether or not voluntarily, shall be entitled to all reemployment rights and benefits provided under subsection (c) of this section for persons ordered to an initial period of active duty for training of not less than twelve consecutive weeks; and shall have the service limitation governing eligibility for reemployment rights under subsections (a) and (b)(1) of this section extended by the period of such active duty.

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